

The term 'court of public opinion' is being taken literally in some parts of the mainland, writes **Jerome A. Cohen**

# People's justice

A discreet struggle is taking place in mainland China over justice, law and governance. A rising, confident country is asking itself what kind of legal system best suits its "national circumstances". A "socialist rule of law with Chinese characteristics" is an attractive political slogan, but troubling to many Chinese legal specialists. What should it mean in practice?

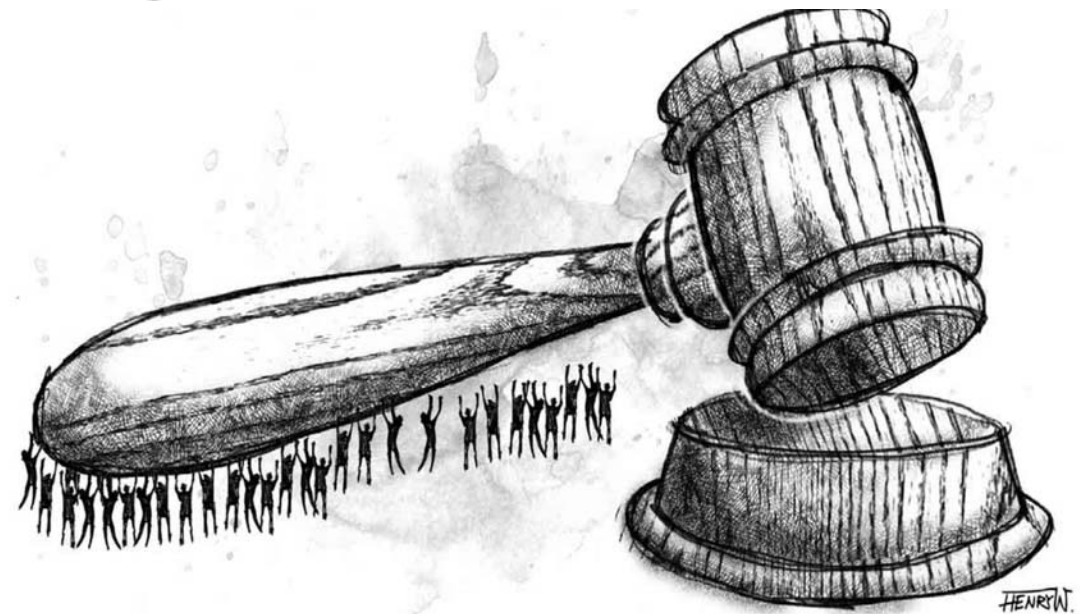
One fundamental question is: what is a "court"? In recent years, all over the mainland, local governments, at great expense, have built imposing, modern courthouses. What should happen inside? And to what extent should judges function outside?

In China, as elsewhere, courts settle legal disputes. But not all legal disputes. As the Sichuan (四川) earthquake tragedy demonstrated, some lawsuits, especially those involving numerous plaintiffs, are not accepted and are required to be handled administratively. Many others, in some times and places, are also excluded from judicial purview as "too sensitive". Tainted milk claims, environmental complaints, land transfers and HIV/AIDS discrimination are examples. Mainland judges are too few and overburdened. Last year, they dealt with almost 11 million disputes, and caseloads are expanding.

What policies and methods are appropriate for contemporary mainland courts, not only in the increasingly complex cities but also in the countryside, where most people still live? Since the Communist Party's 17th congress in late 2007, a new party line preoccupied with fostering "social stability" and a new party leadership of the courts have emphasised settling disputes through informal mediation in preference to formal trials. Mediation is said to be more "democratic", and more congenial to ordinary people and China's traditions, than adjudication.

This new "mass line", which requires judges to learn from, and be responsive to, the people, and which is the most recent revival of what had been the party's judicial policy for the large rural areas that it controlled for almost two decades before its 1949 civil war victory, is even making inroads into adjudication.

Although China's lowest-level courts have long used a system whereby two "people's assessors" often sit with a career judge to form a trial panel for relatively minor cases, the assessors, instead of independently asserting their views,



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generally follow the judge's lead. Now, much more radical experiments with "democratisation" are under way, exemplified by the activist president of the High Court of Henan province (河南), Zhang Liyong, a former party and government official recently assigned to the courts.

Mr Zhang has developed a practice, applicable to all cases, whereby, after a court hearing is completed, the judges consult a group of spectators seated in the courtroom about how the case should be disposed of. No detailed rules have yet emerged about how these "citizen representatives" or "juries" are chosen and consulted or what weight is to be attached to their views. But reported examples indicate that a group of eight or more may be selected from local legislators, officials, advisers and political activists.

This new practice is a vehicle for implementing the party's recent instruction that courts, in making

decisions, should consider popular feelings and social conditions as well as the law and, above all, the cause of the party. The situation remains murky, despite reports that the system has been used in large numbers of civil, administrative and criminal cases, even in the provincial High Court itself and in death penalty cases! The Henan experiment is spreading to other provinces, including neighbouring Shaanxi (陕西).

Of course, in the countryside, informal consultation of the masses has long been a hallmark of judicial justice outside the county courthouse. A single judge is often based in a township that rules many villages. Together with perhaps a local policeman, a government legal official and a people's mediator, the judge will usually hear the views of not only the parties and witnesses but also community members who know the background and circumstances of civil disputes. Although those consulted may not be categorised as "witnesses", "assessors" or "jurors", their input is often crucial. A similar process prevails where, instead of permanently posting a judge to a township, the county court sends one to "ride circuit" among townships and villages.

Recent emphasis on community participation inside the courtroom has created consternation among many judges at all levels. In the Chinese political context, they see "democratisation" as a cloak for

arbitrary rule and the enemy of "professionalism", a euphemism for judicial independence and procedural fairness. Their professional lives are already distorted by the need to clear judgments with superiors within their own court and an oppressive system for evaluating their performance.

Moreover, intrusions from local legislators, prosecutors, administrators and party officials, as well as the pressures of corruption and social networks, present daily challenges. Many are dragging their feet in implementing the new policy while seeking support from influential scholars and public figures, some of whom have boldly opposed it as inconsistent with effective protection of individual rights.

No wonder that many graduates of China's burgeoning law schools shun judicial careers and proposals have surfaced for reverting to the earlier communist practice of filling judicial vacancies with retired military personnel, at least for the central and western regions. One sign of how the struggle is going will be whether judges will be required to abandon their recently donned western-style judicial robes in order to become closer to the masses.

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